Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Section 272(f)(1) Sunset of the BOC	)	WC Docket No. 02-112
Separate Affiliate and Related Requirements	)	

COMMENTS OF SBC COMMUNICATIONS INC.

SUZANNE YELEN
REBEKAH T. GOODHEART
Wiley Rein & Fielding LLP

1776 K Street, NW
Washington, D.C. 20006
(202) 719-4287 – phone
(202) 719-7049 - facsimile

ANU SEAM
GARY L. PHILLIPS
PAUL K. MANCINI

SBC COMMUNICATIONS INC.
1401 Eye Street, NW
Suite 400
Washington, D.C. 20005
(202) 326-8891 – phone
(202) 408-8763 – facsimile

Its Attorneys

August 5, 2002

TABLE OF CONTENTS

Page

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Section 272(f)(1) Sunset of the BOC	)	WC Docket No. 02-112
Separate Affiliate and Related Requirements	)	

COMMENTS OF SBC COMMUNICATIONS

SBC Communications Inc., on behalf of itself and its subsidiaries (collectively referred to as "SBC"), hereby respectfully submits its comments on the Notice of Proposed Rulemaking[1] adopted by the Federal Communications Commission ("Commission") in the above-captioned docket. The NPRM asks whether the Commission should allow the § 272 restrictions to sunset as contemplated in § 272(f)(1) of the Act. Because the separate affiliate requirements heavily encumber BOCs and consumers with no concomitant benefit, the Commission should allow them to sunset as contemplated by Congress and, further, find that no additional rules are needed because of the substantial protections that already exist.

I. INTRODUCTION AND SUMMARY.

Over the past several years, the Commission has repeatedly recognized that the costs of structural separation safeguards far outweigh the benefits. Thus, in *Computer III,* the Commision stated that structural separation imposes substantial costs resulting from the duplication of facilities and personnel, limitations on joint marketing, deprivations of economies of scope, and increased transaction and production costs.[2] More recently, in the *Reverse*

[1] *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, *Notice of Proposed Rulemaking*, 17 FCC Rcd 9916 (2002) (*NPRM*).

[2] *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Review of Computer III and ONA Safeguards and Requirements,* CC Docket Nos. 95-20 and 98-10*, Further Notice of Proposed Rulemaking*, 13 FCC Rcd 6040, ¶¶ 47, 56 (1998) (*Computer III FNPRM).*

Directory Services Order, this Commission waived the CEI requirements for BellSouth's and Verizon's provision of interLATA information services based on the following: (1) granting the petitions will be more efficient than requiring the BOCs to use separate personnel, provisioning, and databases; (2) the cost of compliance with the CEI requirements would outweigh any potential benefits of compliance; (3) the public interest will be furthered because customers will have a choice of competitive reverse directory services; and (4) a number of companies offer competitive alternatives to the BOCs' nationwide reverse directory services.

The Commission should heed these conclusions here to avoid perpetuating the same harms. As discussed in detail below, structural separation adds substantial costs to the BOCs' operations – but not to those of their competitors – thereby severely disadvantaging the BOCs in a highly competitive market. More importantly, structural safeguards disadvantage BOC consumers because they do not receive the high quality end-to-end services to which they are entitled.

Further, these costs are without any countervailing benefits. There is no evidence that a separate subsidiary prevents potential discrimination. To the contrary, the risk of undetected discrimination with or without a separate subsidiary is miniscule. For discrimination to be effective, it has to alter customer-purchasing decisions. But if discrimination is evident to customers, it will be more than obvious to the carriers that are the victims of discrimination and to regulators. Moreover, unless the discrimination were so rampant that large numbers of customers knew that the BOC offered superior service to itself – in which case the discrimination would surely be detected – there is no reason to assume that a customer, dissatisfied with its long-distance service, would switch to the BOC. The customer could just as easily switch to one of the hundreds of other long-distance carriers. Thus, the risk of discrimination in today's market is more theoretical than a real-world possibility.

Additionally, there is no risk of cross subsidization. The Commission's traditional concern with cross subsidization has been that BOCs may have an incentive to allocate improperly to its regulated core business costs that would be properly attributable to their competitive ventures.[3] However, while this may have been a concern in a traditional rate-of-return regulation regime, and to a lesser extent in price caps with sharing, this is no longer an issue. In today's more competitive pure price caps environment, BOCs' local and access rates are capped, thereby denying them *any* ability to engage in cross subsidization.

In any event, as the Commission itself recognized in the *Non Accounting Safeguards Order*, the Act and the Commission's rules are filled with additional nonstructural safeguards that protect against discrimination and cross subsidization. Most importantly, sections 272(e)(1) and (3), which ensure parity of performance and access charge imputation, continue to apply even after the sunset. And the nondiscrimination safeguards of sections 201 and 202, combined with the interconnection obligations under section 251(c), and the Commission's rules on network disclosure ensure further protection for competitors. The Commission also has ample enforcement authority to protect against anti-competitive action. In addition to its enforcement authority under section 271(d), the Commission may impose forfeitures and other sanctions pursuant to sections 4(i), 503, and 206-209 of the Act.

Finally, the ultimate safeguard against discrimination is the existence of competition itself. There are numerous competitive alternatives in both the exchange and the exchange access market. CLECs now account for about 20 percent of local access lines.[4] Significantly, most of these lines — about 60-70 percent — are served by CLECs' own switches.[5] These data,

---

[3] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, CC Docket No. 96-149, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21905, at ¶ 10 (1996) (*Non-Accounting Safeguards Order*).

[4] *See*, Attachment A, UNE Fact Report 2002, Summary of Competitive Entry in SBC Regions – Comments of SBC Communications Inc., CC Docket 01-338, p. 3 (Apr. 5, 2002).("*UNE Fact Report 2002*") at I-6.

[5] *UNE Fact Report 2002*, at I-5.

moreover, vastly understate the success of CLECs in winning lines. Not surprisingly, CLECs have focused on the more profitable segment of the local exchange market and have turned to high-cost, low-volume customers only where the prospect of regulatory arbitrage makes it worthwhile. As a proportion of the market segment where they actually compete for customers, CLECs' market share is thus even higher than the figure noted above. For example, in densely populated areas, CLECs' market share of business services can easily exceed 30 percent, and, in some places, 40 percent.[6]

Similarly, the exchange access market has seen enormous growth in recent years. Data for 2001 reveal that CLECs and IXCs earned between $5.3 and $8.4 billion in special access revenues in 2000, deployed at least 184,000 route miles of local fiber, and attained between 28 percent and 39 percent of total special access revenues.[7] Ninety-one of the top 100 MSAs are served by at least three competitive networks, 77 served by at least seven, and 59 served by at least ten. The top 25 MSAs are served by an average of 32 competitive fiber networks, and the top 50 MSAs by an average of 15.[8] These numbers prove that there is sufficient competition to police the market.

Congress correctly anticipated this development of competition in the years following the grant of section 271 authority. While it imposed structural safeguards on the BOCs, it balanced the competing needs of the BOCs with those of their competitors and determined that the structural safeguard requirements would "cease to apply" on a BOC-by-BOC basis, three years after the BOC gained long distance entry under section 271. As is evident from the statutory language and legislative history, Congress clearly contemplated a blanket sunset for the BOCs after three years. Further, although the Commission assumes in the NPRM that the sunset would apply on a state-by-state basis, both the plain language of the statute and legislative history

---

[6] Comments of SBC Communications Inc., CC Docket 01-338, p. 3 (Apr. 5, 2002).

[7] *UNE Fact Report 2002* at III-1, III-6, L-1, L-2.

[8] *Id.*

support the elimination of these requirements for the entire BOC. Additionally, it is good public policy to do so. As discussed more fully below, it is difficult for one entity, i.e, the BOC, to operate under two sets of rules: the 272 rules for some states but not for others. To take advantage of the sunset for one state only, the BOC will have to expend enormous additional resources – a result contrary to the intent of the Congress and the very purpose of the sunset.[9]

The significant costs of structural separation requirements are burdensome under any circumstances; however, they are particularly burdensome in an economy that is mired in recession. The telecommunications industry is under serious stress today. As Chairman Powell recently recognized, the stocks of the ILECs are now down by 40 percent.[10] The Commission needs to free BOCs of redundant regulation and allow them to compete on a level playing field.

II. EXTENSION OF SECTION 272 REQUIREMENTS WOULD IMPAIR COMPETITION AND HARM CONSUMERS.

A. The Separate Affiliate Requirements Impose Substantial Additional Costs On BOCs That Their Competitors Do Not Incur.

The Commission has already concluded that the substantial costs of structural separation are unnecessary and that anticompetitive conduct can be deterred through nonstructural mechanisms. For example, in *Computer III*, the Commission determined that structural separation requirements impose substantial costs resulting from the duplication of facilities and personnel, limitations on joint marketing, deprivation of economies of scope, and increased transaction and production costs.[11] The Commission also concluded that the costs of structural separation requirements are not justified because non-structural safeguards adequately police

[9] Nonetheless, the BOCs would still gain some significant benefits, especially in joint marketing, from removal of the Section 272 restrictions on a state-by-state basis.

[10] *Financial Turmoil in the Telecom Marketplace: Hearing before the Senate Commerce, Science, and Transportation Committee*, 107th Cong. (2002)(statement of Michael Powell, Chairman, Federal Communications Commission).

[11] *Computer III FNPRM*, at ¶¶ 47 and 56.

behavior without the inefficiencies and costs of structural separation.[12] In *Comsat,* the Commission reiterated its findings that non-structural safeguards are more than sufficient to prevent anticompetitive conduct even if a carrier remains dominant in a particular market. As the Commission stated, "[w]e find that Comsat's continued dominance in the provision of switched voice, private line and occasional-use video services in non-competitive markets is not sufficient reason to continue structural separation because the costs would exceed the benefits."[13]

Further, the Commission has already declined to extend the Act's default sunset in § 272 for BOC information services.[14] Even more recently, in the *Reverse Directory Services* order, the Wireline Competition Bureau waived the CEI requirements for the BellSouth's and Verizon's provision of interLATA information services because it found*, inter-alia*, that granting the petitions will be more efficient than requiring the BOCs to use separate personnel, provisioning, and databases, and that the cost of compliance with the CEI requirements would outweigh any potential benefits of compliance.[15]

The Commission should heed these conclusions here to avoid perpetuating the competitive harms that result from structural separation. If anything, the section 272

---

[12] *Computer III Further Remand Proceedings,* CC 95-20 and 98-10, *Report and Order*, 14 FCC Rcd 4289, ¶7 (1999) (*Computer III Report and Order)*. These findings were subsequently upheld by the courts. *California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (*California II*); *California v. FCC,* 39 F.3d 919 (9th Cir. 1994) (*California III*), *cert. denied*, 115 S. Ct. 1427 (1995).

[13] *See COMSAT Corporation; Petition Pursuant to § 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, 13 FCC Rcd 14083, ¶ 166 (1998).

[14] *Request for Extension of Sunset Date of the Structural, Nondiscrimination and Other Behavioral Safeguards Governing Bell Operating Company Provision of In-Region, InterLATA Information Services,* 15 FCC Rcd 3267, ¶¶ 3-4 (2000). "based on the record before us, we find that there are several safeguards that will limit adequately BOCs ability to discriminate against non-affiliated information service providers even after Section 272(f)(2) takes effect. For example, there are non-structural safeguards that will limit the BOCs ability to discriminate against non-affiliated information service providers."

[15] *BellSouth Petition for Waiver of the Computer III Comparably Efficient Interconnection Requirements and Petition of the Verizon Telephone Companies for Waiver of Comparably Efficient Interconnection Requirements to Provide Reverse Directory Assistance*, CC Dockets 01-288 and 02-17*, Memorandum Opinion and Order*, DA 02-1747 (July 19, 2002).

requirements are more onerous than others because, in addition to restrictions on maintaining separate books and accounts, having separate officers, directors and employees, and conducting all transactions on an arms length basis, they require that:

> (a) the BOC and its § 272 affiliate be precluded from jointly owning switching or transmission facilities or the land or buildings where those facilities are located;
>
> (b) a § 272 affiliate be precluded from performing operating, installation, and maintenance functions associated with the BOC's facilities; and
>
> (c) a BOC or any BOC affiliate, other than a § 272 affiliate itself, be precluded from performing, operating, installation, or maintenance functions associated with the facilities that the § 272 affiliate owns or leases from a provider other than the BOC with which it is affiliated.[16]

The above restrictions are absolute; in other words, the BOC and its 272 affiliate cannot perform these operation, maintenance, and installation functions for each other even if they offer to do the same for others in a nondiscriminatory manner.

Largely as a result of these prohibitions, SBC must duplicate its resources – costs that its competitors are not required to incur. SBC estimates that integration of long distance and local operations for the Southwestern Bell ("SWBT") region would result in savings of 50 percent for personnel in the network engineering, customer care, billing, and network operations departments.[17] Further, SBCLD could achieve 40 percent savings from personnel employed for network testing and 20 percent for network administrative staff. Additionally, there would be almost a 75 percent savings in the Human Resources functions, another 75 percent in the Regulatory and Legal functions, and about 50 percent in the Accounting functions. Further, SBC

[16] *Non-Accounting Safeguards Order* at ¶¶ 162 and 163.

[17] These are conservative estimates based on the assumption that SBCLD must continue to maintain adequate personnel to provide service for SBC's affiliated BOCs still subject to 272 restrictions.

incurs duplicate costs because it must maintain separate networks and facilities for each affiliate.[18]

Even more importantly, the Commission's prohibition on joint ownership of facilities results in sub-optimized networks. Because the BOC and its § 272 affiliate cannot jointly own switching and transmission equipment, or the land and buildings in which they are located, there is unnecessary duplication of assets. Although the BOC and the 272 affiliate often use the same vendor, they must make their purchase decisions and purchases separately. This obviously prevents SBC from taking advantage of bulk buying power and results in SBC paying much more than it would otherwise be required to do. Further, vendors today offer equipment or services that apply to both local and long distance networks. However, because of § 272 restrictions, SBC is precluded from using such integrated equipment in the most efficient manner possible, while competitors can forge ahead with new integrated local and long distance products. The substantial additional costs and inefficiencies that result are a direct result of the structural separation requirements.

B. It Is In The Public Interest To Provide BOC Consumers With Seamless End-To-End Service.

One of the most critical benefits that consumers demand in today's complex market is the provision of seamless end-to-end service. Section 272 structural separation requirements prevent SBC from providing this to its customers. For example, if SBC offers a business customer service connecting its Dallas and Houston locations — the SBC BOC cannot, unlike AT&T or some other interexchange carrier, offer one end-to-end serving arrangement to its customer. Rather, SBC offers three different serving arrangements: one intraLATA arrangement from

[18] In addition, BOCs may be required to provide incidental interLATA services through the § 272 affiliate. For example, absent a forbearance order, BOCs would be required to provide their National Directory Assistance (NDA) service through the § 272 affiliate because this entails retrieving directory assistance listings from facilities in another LATA. This can cause enormous duplication and inefficiencies because the personnel, facilities, and equipment can, and logically should, be shared with the BOCs local directory assistance operations. The Commission should enable BOCs to provide such services through an integrated operation without expending time and resources in forbearance proceedings.

Dallas to the 272 affiliate's point of presence (POP), a second interLATA arrangement that belongs to the 272 affiliate, and a third intraLATA serving arrangement from the 272 affiliate's POP to the Houston location**.** This arrangement complicates the design and ordering process, as well as coordination and installation for a customer who believes that it is receiving service from a single agent.

In addition, because of § 272 operation, installation, and maintenance (OI&M) restrictions, SBC cannot have one engineer design the entire circuit. Similarly, the BOC and the section 272 affiliate cannot effectively coordinate the installation of the networks. SBC is currently required to deploy separate installation crews for the same customer so that they can do the physical installation on different portions of the network. Not only does this result in varied appointments for the customer, but, more importantly, it increases the chances of error right at the beginning of the process.

This same problem carries through in the repair environment. Even if there is a simple problem in the network, the BOC's technician cannot clear it from the 272 affiliate's part of the network. Because of OI&M concerns, the BOC and the section 272 affiliate often must roll out two trucks for the same problem: one to clear the trouble from the BOC's side of the network and the other to do the corresponding activity on the long distance side of the network. If the customer is still having problems then the duplicative process begins again.

Further, and most frustrating, SBC's customer cannot receive end-to-end testing from either the BOC or the section 272 affiliate. Thus, if the customer calls in with a trouble report, the BOC cannot simply test across the network and determine the problem. Instead, it has to take the following steps: determine whose side of the network has the problem; if the problem is in the long distance network, send a trouble report to the 272 affiliate; give the affiliate time to work out the problem; ask for status updates from the affiliate; and then inform the customer about the status. Any other provider today can take one trouble report, test the circuit across the network, and inform the customer right away of the problem. Although SBC can do end-to-end testing today with other interexchange carriers like AT&T and Sprint to provide their long distance customers with seamless service, the Section 272 restrictions prevent SBC from providing this service to its *own* customers. These requirements deny consumers one of the fundamental benefits of the Act: the ability to achieve seamless end-to-end service from one provider.

III. THERE ARE NO BENEFITS FROM EXTENDING OR MODIFYING THE STRUCTURAL SEPARATION REQUIREMENTS.

The Commission asks in the NPRM whether it should extend the structural separation requirements or modify them to impose less stringent structural or non-structural separation requirements.[19] It should not. Although the Commission has expressed concerns about the BOCs ability and incentives to discriminate or engage in cross subsidization, the risk of such behavior is negligible. Further, this Commission has itself recognized that there are sufficient nonstructural safeguards already embedded in the statute and Commission rules. Even after section 272 sunsets, BOCs will be subject to various nondiscrimination and cross subsidization requirements. And finally, competition itself is the ultimate safeguard in any market.

A. Concerns About BOC Incentives and Ability to Discriminate Are Unnecessary.

In the *Non-Accounting Safeguards Order*, this Commission expressed concerns about the BOCs' ability and incentives to discriminate against their competitors.[20] However, these concerns are unwarranted. As an initial matter, they ignore the reality of real-world business; all carriers, including the BOCs, have to build upon customer goodwill, not destroy it. Any attempt by a BOC to provide inferior service to other interexchange carriers — thereby creating inferior service for its local exchange customers — is more likely to alienate local exchange customers than win new interexchange customers.

[19] *NPRM,* ¶17.

[20] *Non Accounting Safeguards Order*, ¶¶ 9 and10.

Further, even if a BOC did discriminate, it could not be sure that it would derive any benefit from the discrimination. First, a customer might well assume that the BOC caused the poor service. Second, even if the customer does not blame the BOC for the service problems, there is no reason to assume that the customer would switch its long distance service to the BOC affiliate. There are over 800 interexchange carriers offering service today, large numbers of which compete in any given state. A customer dissatisfied with Sprint, for example, would be just as likely to switch to AT&T, WorldCom, or one of the other carriers serving that marketplace as it would a BOC affiliate. Only if the general public was aware that the BOC discriminated against all carriers vis-à-vis the BOC's own affiliate would customers have an incentive to switch to the BOC affiliate. If customers were aware of such widespread discrimination, surely it would be apparent to competitors and regulators. The Department of Justice recognized this when it stated: "[D]iscrimination is unlikely to be effective unless it is apparent to customers. But, if it is apparent to customers, it is also likely to be apparent to regulators or to competitors that could bring it to the regulators' attention."[21]

The risk of discrimination is even lower in the context of sections 271 and 272, where state and federal regulators examine the BOCs' performance closely. Every BOC that has been granted § 271 authority is subject to extensive performance plans that measure almost every aspect of local exchange wholesale performance.[22] The performance metrics required by these plans are made available to state commissions, this Commission, and competitors on a monthly

---

[21] Report and Recommendations of the United States Concerning the Line of Business Restrictions Imposed on the Bell Operating Companies by the Modification for Final Judgement, filed Feb 3, 1987 at 96. SBC does not disagree with the Commission's conclusion in the Interconnection Order that there may be forms of discrimination that are imperceptible to end users. Interconnection Order at ¶ 224. However, such types of discrimination would not lead to the acquisition of market power. Only discrimination that affects the purchasing decisions of large numbers of customers could confer market power.

[22] *See, e.g.*, *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri*, CC Docket No. 01-194, *Memorandum Opinion and Order*, 16 FCC Rcd 20719, Appendices B and C, ¶¶ 129-134 (2001).

basis and are closely examined by regulators. In addition, each of these plans has included damages and penalties "at a level above the simple 'cost of doing business'"[23] to ensure BOC compliance. Thus, any attempted discrimination by the BOC would be easily detected and would subject to the BOC to substantial financial penalties. As a practical matter, therefore, there is little risk of discrimination against competitors.

B. The Commission Should Reaffirm Its Earlier Conclusion That A Number of Safeguards Are Already Available To Protect Against Discriminatory Behavior.

In the *Non-Accounting Safeguards Order*, this Commission recognized that while the section 272 requirements would sunset in three years, numerous other safeguards would continue to exist. Thus, the Commission stated:

> A number of safeguards will be available to prevent discriminatory behavior by BOCs after the separate affiliate requirements of section 272 cease to apply. As we explain in detail above, section 251(c)(5), section 251(g), and the Commission's rules imposing network disclosure and equal access requirements oblige BOCs to provide exchange access on a nondiscriminatory basis. In addition, intraLATA services and facilities must be provided on a nondiscriminatory basis under section 251(c)(3), and the provision of interLATA services and facilities will continue to be governed by the nondiscrimination provisions of sections 201 and 202 of the Act. In addition, as local competition develops, it will provide a check on the BOCs' discriminatory behavior because competitors of the BOC affiliates will be able to turn to other carriers for local exchange service and exchange access. [24]

In addition to the statutes cited above, sections 272(e)(1) and (3) remain in effect after the sunset.[25] These provisions address the two keystones of nondiscriminatory behavior: parity in performance and access charges. Subsection (1) provides that a BOC fulfill any requests for local or exchange access services for unaffiliated entities in a period no longer than it fulfills

---

[23] *Id.*, at ¶130.

[24] *Non-Accounting Safeguards Order,* at ¶271.

[25] In the *Non-Accounting Safeguards Order*, the Commission determined that sections 272(e)(2) and (4) will apply only if the BOC retains its separate affiliate after the sunset. If the BOC integrates its operations, however, these requirements will cease to apply. In the *NPRM*, the Commission has asked whether it should reconsider its interpretation of the above statute. It should not. As discussed in detail herein, there are already sufficient safeguards to protect competition.

such services to itself and its affiliates, and subsection (3) requires that a BOC impute to itself an amount for local and exchange access services that is no less than the amount charged to unaffiliated carriers. These provisions offer more than enough protection against discrimination.

Nor does sunset of section 272 requirements raise any risk of cross subsidization. Concerns about cross subsidization are a relic from the past: when BOCs were under rate of return regulation, and, to a lesser extent, price caps with sharing regulation. Thus, in the *Non-Accounting Safeguards Order*, the Commission stated that the BOC may have an incentive to allocate improperly to its regulated core business costs that would properly be attributable to its competitive ventures "if the BOC is regulated under rate of return regulation, a price caps structure with sharing (either for interstate or intrastate services), a price caps scheme that adjusts the X-factor periodically based on changes in industry productivity, or if any revenues it is allowed to recover are based on costs recorded in regulated books of accounts."[26] None of those concerns are valid today, when BOCs are under a pure price cap regime. As the Commission has itself noted: "[b]ecause price cap regulation severs the direct link between regulated costs and prices, a carrier is not able to recoup misallocated nonregulated costs by raising basic service rates, thus reducing the incentive for the BOCs to allocate nonregulated costs to regulated services."[27]

Finally, the Commission has numerous enforcement options after the sunset.[28] First, before and after sunset, § 271(d) continues to give the Commission substantial authority to

---

[26] Id at ¶ 10.

[27] *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area,* Notice of Proposed Rulemaking, 11 FCC Rcd 18877 (1996), ¶ 136, *citing Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards,* 6 FCC Rcd 7571, 7596 (1991). *See also United States v. Western Electric Co., et al.,* 993 F.2d 1572, 1580, *cert. denied,* 114 S. Ct. 487 (1993): "[Price cap regulation] reduces any BOC's ability to shift costs from unregulated to regulated activities, because the increase in costs for the regulated activity does not automatically cause an increase in the legal rate ceiling."

[28] *NPRM*, at ¶27.

enforce Sections 272(e)(1) and (3).[29] Section 271(d) allows the Commission to: order the BOC to correct the violation; impose a penalty pursuant to title V; and suspend or revoke § 271 approval. Second, the NPRM correctly states that the sunset "does not affect the Commission's authority to impose forfeitures and other sanctions and to grant damages and injunctive relief pursuant to §§ 4(i), 503, and 206-209 of the Act."[30] Third, the § 208 complaint process allows carriers to collect monetary damages for violations of these nondiscrimination provisions. Through these enforcement tools, the Commission has the authority it needs to address any issues that might arise in a particular case.[31] There is, therefore, no justification for either extending or modifying the structural safeguards of section 272.

C. Past Conduct Demonstrates BOCs Compliance With Section 272 Requirements.

BOC behavior in states with § 271 authority confirms that the Commission should not be concerned about potential discrimination or cost misallocation. BOC wholesale performance has continued at its high level post-Section 271 relief. In addition, SBC is not aware of any instances of anti-competitive conduct in the provision of interLATA information services in the two years since the Commission allowed those separate affiliate requirements to sunset. This only confirms the Commission's conclusion that non-structural safeguards adequately police against discriminatory behavior.[32]

[29] *NPRM*, at ¶27.

[30] *NPRM*, at ¶27 (footnote omitted).

[31] Therefore, after sunset, a party filing a complaint regarding BOC actions in a specific state should bear the burden, as with any other complaint, of proving that a violation has taken place and that Commission action is required.

[32] *Request for Extension of the Sunset Date of the Structural, Nondiscrimination, and Other Behavioral Safeguards Governing Bell Operating Company Provision of In-Region, InterLATA Information Services*, CC Docket 96-149, *Order,* 15 FCC Rcd 3267 (2000).

The § 272 biennial audits of SBC and Verizon further demonstrate that BOCs are meeting their § 272 obligations.[33] SBC's first audit report was filed at the Commission in December 2001. After an exhaustive review, the independent auditor found only minor issues, such as a failure to post a small number of agreements on the Internet within the required time.[34] The auditors found no evidence of either discrimination or cross subsidization. Similarly, the independent audit of Verizon found no major issues and no evidence of anti-competitive violations.[35] Therefore, past conduct of the BOCs clearly indicates that fears about BOCs engaging in anti-competitive actions are misplaced.[36]

D. Competition in the Local Exchange and Exchange Access Markets Adequately Polices BOCs' Behavior And Makes Discrimination And Cross-Subsidization Extremely Difficult.

As the Commission itself recognized, growing competition provides a check on potential BOC discrimination because competitors of BOC affiliates are able to turn to other carriers for local exchange service and exchange access.[37] The Commission has already determined that in states where § 271 relief is granted, the local exchange and exchange access market is "irreversibly open" to competition. In addition, market evidence demonstrates that competition in the local and exchange access markets increases materially after Section 271 authority is

[33] *NPRM, at* ¶16.

[34] *See, e.g.* SBC Communications Inc., Report of Independent Accountants on Applying Agreed-Upon Procedures, CC Docket No. 96-150, Appendix A at 16 (filed December 2001).

[35] Verizon Communications Inc., Section 272 Biennial Agreed-Upon Procedures Engagement, CC Docket No. 96-150 (filed. Feb. 6, 2002).

[36] The Commission asks whether it should consider complaints filed against the BOCs at the federal and state level in evaluating BOC compliance. It should not for several reasons. First, and most important, complaints filed provide no information on the validity of the complaint. To assume that a complaint is valid deprives the BOC of due process. Rather, the Commission should rely only on final regulatory or judicial findings. Second, evaluating BOC compliance based on the number of complaints filed would undermine the incentive to resolve disputes without resorting to litigation. Third, considering the number of complaints filed gives parties the incentive to file frivolous complaints regardless of whether they have merit.

[37] *Non-Accounting Safeguards Order,* at ¶271.

granted. The Commission has confirmed that "states with long distance approval show greatest competitive activity."[38] Similarly, upon reviewing market conditions, the Chairman of the House Telecommunications Subcommittee, Billy Tauzin, recognized that, "where we see fierce competition, it's when 271s [long distance applications] are approved, not while we're waiting for them to get approved."[39]

The dramatic increase in local competition post-Section 271 approval occurs in part because carriers introduce aggressive marketing strategies upon BOC long-distance entry. For example, in the first six months after the Commission granted SWBT's application to provide long distance in Texas, CLECs gained "an increase of over 60 percent in customer lines."[40] In November 2001, the number of CLEC access lines in Texas exceeded 2.2 million, representing a 95 percent increase since SBC's authorization to provide long-distance service in Texas. Currently CLECs have about a 21 percent market share in Texas; a number that is significantly higher than the 7 percent in June 2000**.** Verizon has also seen competition increase dramatically in states where it has received § 271 approval. Within one year after granting § 271 approval in New York, the Commission found that the CLECs' market share and access lines increased "over 130% from the time the FCC granted Verizon's long distance application in New York."[41]

Similarly, competition in the exchange access market constrains BOC conduct. The Commission has recognized the increasingly competitive nature of the exchange access market in granting BOCs pricing flexibility in a growing number of markets. In the *Pricing Flexibility*

---

[38] FCC News Release and Report: Federal Communications Commission Releases Latest Data on Local Telephone Competition, *Total Lines Reported by New Entrants Climbed to 16.4 Million* (May 21, 2001) (*2001 Local Competition News Release*).

[39] Mary Mosquera, *AT&T: Regional Bells Still Block Competition*, CMP TECHWEB, February 7, 2001 (quoting Rep. Billy Tauzin).

[40] *See, 2001 Local Competition PN.*

[41] *See, 2001 Local Competition PN.*

Order,[42] the Commission established competitive "triggers" that must be satisfied before the Commission will substantially relax or completely deregulate special access rates for price cap LECs.[43] The Commission's pricing flexibility tests were carefully crafted to ensure that BOCs and other price cap ILECs do not engage in discriminatory behavior. Thus, these strict competitive showings ensure that "that markets are sufficiently competitive … to discourage incumbents from either excluding new entrants or raising rates to unreasonable levels,"[44] and will continue to police BOCs' behavior after § 272's restrictions have sunset.

In 2001, just two years after the Commission's *Pricing Flexibility Order*, collocation by facilities-based competitors was so prevalent that 80 percent of BOC special access revenue qualified for Phase I pricing flexibility and nearly two-thirds qualified for Phase II relief.[45] Moreover, these figures actually understate the level of competition because the Commission's collocation-based competitive tests do not consider competition from entities that bypass the ILEC, connecting end users directly to fiber rings that connect to IXCs and ISPs. Data from 2001 also reveals that CLECs and IXCs earned between $5.3 and $8.4 billion in special access

[42] *See Access Charge Reform*, CC Docket No. 96-262, *Fifth Report and Order*, 14 FCC Rcd 14221 (1999) (Pricing Flexibility Order), *aff'd, WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

[43] The strict tests needed to secure Phase I and Phase II relief demonstrate that pricing flexibility is predicated on substantial competition by facilities-based providers. To obtain Phase I relief for special access transport services, a LEC must show either (a) that at least one facilities-based collocator is present in at least 15 percent of the LEC's wire centers in the relevant MSA, or (b) that at least one facilities-based competitor is collocated in wire centers accounting for 30 percent of the petitioner's special access revenues (other than from channel terminations) in the MSA. To obtain Phase II relief for transport services, a facilities-based collocator must be present either in 50 percent of the wire centers or in wire centers accounting for 65 percent of the LEC's non-channel termination special access revenues. For channel terminations, the triggers are even higher: for Phase I relief, a facilities-based collocator must be present either in 50 percent of wire centers or wire centers accounting for 65 percent of channel termination revenues, and for Phase II relief, such a collocator must be present either in 65 percent of wire centers or wire centers accounting for wire centers accounting for 85 percent of the petitioner's channel termination revenues. *See* 47 C.F.R. §§ 69.709, 69.711 (2000).

[44] *Pricing Flexibility Order*, at ¶68. The test is based on the number of non-affiliated facilities-based collocators. In affirming the Commission's *Pricing Flexibility Order*, the D.C. Circuit found that the Commission's competitive showing tests, based on collocation-based triggers, "can reasonably serve as a measure of competition in a given market and predictor of competitive constraints upon future LEC behavior." *WorldCom v. FCC*, 238 F.3d at 459.

[45] *Special Access Fact Report, at 5-7.*

revenues in 2000, deployed at least 184,000 route miles of local fiber, and attained between 28 percent and 39 percent of total special access revenues.[46]

In total, there are more than 1,800 fiber networks in the top 150 MSAs, which contain nearly 70 percent of the U.S. population. Ninety-one of the top 100 MSAs are served by at least three competitive networks, 77 served by at least seven, and 59 served by at least ten. The top 25 MSAs are served by an average of 32 competitive fiber networks, and the top 50 MSAs by an average of 15.[47] These numbers should make it self evident that there is sufficient competition in the exchange access market to police any discriminatory behavior by BOCs.

Congress expected that the § 272 restrictions would no longer be necessary three years after a BOC was granted interLATA authority. The market forces that Congress anticipated would ensure a level playing field three years after interLATA entry have developed. Given the competitive nature of the local and exchange access markets, there is no need to extend the § 272 restrictions.

IV. CONGRESS WEIGHED COMPETING CONSIDERATIONS AND DETERMINED THAT THE SECTION 272 REQUIREMENTS WOULD NO LONGER BE NEEDED THREE YEARS AFTER A BOC OBTAINED SECTION 271 AUTHORITY.

The Commission's NPRM raises the issue of whether the sunset of section 272 requirements should occur on a state-by-state basis, or whether it should apply to each BOC, three years after the BOC receives its section 271 authorization. Closely related to this issue is the Commission's second question, i.e., whether the sunset should automatically apply after three years or whether the Commission should conduct a case-by-case analysis in each instance. As discussed below, Congress has already weighed these issues and provided answers in the language and legislative history of the Act.

---

[46] *Special Access Fact Report* at 5.

[47] *UNE Fact Report 2002* at III-1, III-6, L-1, L-2.

A. The Plain Language Of The Statute and Legislative History Indicate That The Sunset Applies To Each BOC And That The Three Year Sunset Was To Be The General Rule.

Section 272(f)(1) states that "[t]he provisions of this section [272] (other than subsection (e)) shall cease to apply with respect to the manufacturing activities or the interLATA telecommunications services of *a Bell operating company* three years after the date *such Bell operating company* or any Bell operating company affiliate is authorized to provide interLATA telecommunications services under § 271(d) unless the Commission extends such three-year period by rule or order."[48] Thus, the language of the statute establishes two things: (1) that the three year sunset is the default scenario, i.e., the general rule is that the three-year sunset will occur on its own unless the Commission takes affirmative action to extend it; and (2) the sunset applies with respect to the operations of the entire Bell operating company and not simply to its operations in a particular state.[49]

Legislative history also supports this reading. Before the current Section 272 language was enacted, the House Bill (H.R. 1555) provided that the separate subsidiary requirements and nondiscrimination provisions would "cease to apply in any local exchange market *three years* after the date of enactment of this part."[50] Subsequently, the Bliley amendments changed that

[48] 47 U.S.C. § 272(f)(1) (emphasis added).

[49] The statute's directive that § 272 shall cease to apply three years after "such Bell operating company or *any Bell operating company affiliate* is authorized to provide services under § 271(d)," appears to refer to the § 272 affiliate, which is the affiliate authorized to provide services under § 271(d). Thus, § 272(f)(1) directs that the sunset applies with respect to the BOC three years after the BOC or its 272 affiliate is authorized to provide interLATA service. The term "any" affiliate refers to any affiliate that may have received authorization instead of the BOC, i.e., the 272 affiliate. Congress used similar language in § 271(a) where it stated, "neither a BOC nor any affiliate of the BOC may provide interLATA services."

The statutory reference to "*any* Bell operating company affiliate" can arguably also be read to support the proposition that the sunset occurs for *all* affiliates three years after *any* one affiliate obtains § 271 authority. Because all SBC BOCs are affiliates of each other, this would mean that the sunset would occur for a BOC (e.g., Pacific Bell) three years after any affiliate, i.e., SWBT, received authority to provide interLATA services. However, that construction of the statute seems overly broad. The first construction of the term is more appropriate because it more closely relates to the authorization referred to under § 271(d), and is consistent with the language that these provisions shall cease to apply with respect to "a" BOC after "such" BOC is authorized to provide interLATA telecommunications services.

[50] *See*, H.R. Rep. No. 104-204, at 11 (1995). (referring to Section 246(k)).

provision to state that these requirements would "cease to apply to any Bell operating company in any State *18 months* after the date such Bell Operating Company is authorized pursuant to section 245(c) [codified as Section 271] to provide interLATA telecommunications services in such State."[51] Thus, the House Bill specified that the structural safeguards would sunset in 18 months and on a state-by-state basis.

Companion legislation in the Senate (S. 652) did not contain a sunset provision but gave the Commission authority to make "exceptions" to the requirements of § 272.[52] The Senate intended for the exception to be used whenever a requirement of § 272 was no longer necessary to protect consumers or to prevent anticompetitive behavior.[53] The Senate essentially preferred a case-by-case approach instead of a general rule that would sunset the requirements automatically after a period of time.

The Conferees, however, took a different approach from both the House and the Senate bills. They rejected the Senate's case-by-case approach[54] and adopted a blanket sunset provision (3 years, not 18 months as provided for by the House Bill). At the same time, they rejected the state-by-state approach of the House and substituted the current BOC-by-BOC language. Additionally, the Conference Report clarified that this three-year period "would commence on the date on which the BOC is authorized to offer interLATA services."[55] Thus, the above sequence of events demonstrates Congressional intent that: (1) absent compelling reasons, the

---

[51] H.R. Rep. No. 104-223, at 7 (1995).

[52] S. Rep. No. 104-230, at 24 (1995).

[53] *Id.*

[54] The Senate Committee also stated that it did not intend the FCC to grant an exception to the basic separate subsidiary requirement for any service prior to authorizing the provisions of interLATA service by the Bell operating company seeking the exception. *Id*. This too was rejected by the Conferees.

[55] H.R. Conf. Rep. No. 104-458, at 152 (1995), *reprinted in* 1996 U.S.C.C.A.N. 164.

sunset should occur in three years; and (2) the sunset would apply to each BOC, three years after the BOC received its § 271 authority.[56]

B. A BOC-by-BOC Sunset Is Also Good Public Policy And Is The Only Way To Provide BOCs The Full Benefit Of The Sunset.

The BOC-by-BOC sunset is not only required by a plain reading of the statute but also is good public policy. The BOC only receives Section 271 authority in a given state after it has proven that its local and exchange markets are irreversibly open to competition. And much of that showing relies on manual and mechanized processes that for all practical purposes the BOC has implemented for the entire entity or region, not necessarily just for one state. For example, SWBT's Operation Support Systems (OSS) operate on a regional basis; with limited exceptions, changes made to the SWBT OSS are implemented on a uniform basis for all five SWBT states. Moreover, SWBT employs the same systems, processes and procedures to collect and report performance measurements for all of SWBT's five state service territory.

Furthermore, lifting § 272 restrictions for one state would be difficult to implement as an operational matter. If, for example, SBC decides to integrate its Texas operations with the BOC and leave operations of the other four states in the § 272 affiliate, then it will have to reorganize its operations at substantial expense and inconvenience to its customers and the business offices. Thus, for instance, SWBT currently has one centralized organization that takes customer trouble reports. In a state-by-state sunset, if a SWBT representative took a trouble report from a Texas customer, then it would be permissible for the representative to provide end-to-end service to that customer. In the Texas situation, SWBT could essentially check the circuit, isolate the problem, clear and restore service, and close the trouble ticket. On the other hand, if the trouble report was from a Missouri customer, then the trouble ticket would have to be handed off to the

[56] Although in the Information Services Sunset proceeding, SBC suggested that section 272(f)(1) may apply on a state-by-state basis, SBC had not explored this statute and its legislative history at that time. *Opposition of SBC Communications Inc.*, CC Docket No. 96-149, December 17, 1999, at 4.

§ 272 affiliate who would then determine and fix the problem while providing SWBT with a status update for the customer.

One of the biggest challenges from these double standards would be to prevent inadvertent noncompliance for states that do not receive the sunset.[57] To minimize these problems, SWBT would need to train service representatives, make system changes, and set up additional internal controls to separate out Texas from the other states.[58] Not only would these changes be costly and inefficient the first time, but the requirements would change with each subsequent sunset in the region. Therefore, a state-by-state sunset would require a continuous process of rolling system changes and modifications until SWBT received sunset in the last state.

Further, in today's marketplace, customers are not necessarily located in just one state. SBC's business customers have offices throughout the SWBT region. A state-by-state sunset would mean that SWBT would interact with the same customer in different ways depending on the circuit or service at issue. For a Texas circuit, the BOC or the section 272 affiliate would probably be able to deliver service more promptly. But for a Kansas circuit, the timing and service may be entirely different. This kind of confusion is unacceptable to business customers who will simply blame SBC for not presenting an effective offer.[59]

---

[57] Service representatives in these call centers deal with large volumes of calls. Even if they knew and understood the rules about distinguishing Texas from other states, they might automatically process a Missouri trouble in the same manner as the Texas troubles, simply because the last twenty troubles were from Texas and were all handled in one particular manner.

[58] This applies not only for trouble reports but for most BOC operations. For example, the joint marketing script would change for states with sunset, i.e., Texas. The script is on-line and the computer systems would require changes to implement different scripts for different states.

[59] Assuming a state-by-state sunset, the additional operational cost of integration could be avoided if SWBT elected to continue Texas operations through its separate affiliate until it received sunset in all remaining states; However, that would provide no practical relief from the requirements of § 272(b)(1) - (5) and § 272(c) as these requirements apply to the entities (that is the BOC and § 272 affiliate). For example, under § 272(b)(2) it would be virtually impossible for the SWBT legal entity to share its Officers and Directors in Texas, while avoiding overlaps in Arkansas, Kansas, Missouri and Oklahoma.

Therefore, it is imperative that the Commission remain faithful to the plain reading of the statute and the intent of Congress and allow a BOC-by-BOC sunset to occur after three years.

V. CONCLUSION.

In § 272(f)(1), Congress anticipated that the separate affiliate and related restrictions would not be necessary three years after BOC in-region interLATA 271 entry. Post-271 experience in the local and exchange access market has shown that this prediction was correct. The costs of structural separation, including costs of personnel, provisioning, and systems, far outweigh any benefits that such separation can provide. Further, existing Commission enforcement authority and non-structural safeguards ensure that BOCs will not be able to either discriminate against their competitors or improperly cross-subsidize services. Therefore, as contemplated by the 1996 Act, the Commission should allow the § 272 restrictions to sunset for the BOC three years after BOC entry in a state.

Respectfully submitted,

SBC Communications Inc.

By: /s/ Suzanne Yelen

SUZANNE YELEN
REBEKAH T. GOODHEART
Wiley Rein & Fielding LLP

1776 K Street, NW
Washington, D.C. 00006
(202) 719-4287 – phone
(202) 719-7049 - facsimile

By: /s/ Anu Seam
ANU SEAM
GARY L. PHILLIPS
PAUL K. MANCINI

SBC COMMUNICATIONS INC.
1401 Eye Street, NW
Suite 400
Washington, D.C. 20005
(202) 326-8891 – phone
(202) 408-8763 – facsimile
Its Attorneys

August 5, 2002